TABLE OF CONTENTS

Introduction

In the name of Allah, The Most Beneficent, The Most Merciful. Greetings and salutations on the choicest messenger, Muḥammad, his noble family and illustrious Companions

Muslims believe that Islam is suitable for all times and circumstances. This belief is sanctioned by copious textual evidences from the Holy Qur'ān as well as a number of traditions of the Prophet, upon him peace and blessings. Furthermore, the success of Islam as a practical way of life, especially apparent in its formative years, has further strengthened this belief.

Islam as a whole and more specifically Islamic commercial law has probably never faced a greater challenge to prove its suitability than now. The 'now' referring to a world which is developing in leaps and bounds; where everyday witnesses new transactions, innovative ways of commercial interaction and previously unheard of modes of financing.

The gauntlet was thrown and Islam accepted the challenge presented to it by modern society. This challenge was and is a blessing in disguise as it has breathed life into Islamic commercial law and also afforded other than persons already engaged in Islamic studies the opportunity to study it. This challenge has seen the writing of many articles on various aspects of Islamic commercial law.

The present study aims to explain *muḍārabah*, a widely employed financial instrument, in a fair amount of detail. The study will be in light of the *Shāfi'ī* school of thought but will also focus on comparative law where the need arises to do so.

THE LITERAL MEANING OF MUḌARABA AND ITS CORRELATION WITH THE ACTUAL CONTRACT

Muḍaraba and *Qirāḍ* are synonyms, used interchangeably. The former is preferred by the `Irāqis while the latter enjoys prominence among the Ḥijāzis. The contract is termed Muḍāraba since it entails *ḍarb fi al arḍ,* (traveling) and Qirāḍ, which literally means 'to cut', since both the investor and the worker receive a cut of the profits.[1]

Technically, Qirād and Muḍāraba have as their legal subject matter a contract comprising agency by the owner to another by giving him wealth so that he may trade with it and the profits are shared amongst them.[2]
The objective of muḍāraba is therefore the acquisition of profits and its sharing amongst the investor and worker with the capital from one side and labor from the other.

THE LEGAL JUSTIFICATION OF MUḌARABA

a) *Ijmā '*[3]: There is a consensus amongst the Scholars regarding the permissibility of muḍāraba.
b) The *Sunna*[4]: Jurist relies on the muḍāraba contract concluded by the Prophet, upon him peace and blessings, with Khadījah approximately a year and two months before marrying her. The Prophet related this incident after the advent of prophet hood, thereby approving it and setting the norm.
c) Analogy: Muḍāraba is analogous to *musāqāt* in that musāqāt was legalized due to the need of such a contract. The land owner might not have the expertise to work the land whereas the worker may not have land on which to work. The same meaning is found in muḍāraba[5], the owner of wealth may not have the opportunity for a profitable investment, while the person who has such an opportunity may not have wealth.
Māwardi has sought to justify muḍāraba from the Qur'ān employing verse:198 sura:1 that reads: "There is no sin on you if you seek the Bounty of your Lord" [6]

---

[1] Ibn Ḥajr, Tuḥfa al-Muḥtāj bi-shạrḥ al-Minhāj, Dār al-Kutub al-'Ilmiyyah, First edition 2001
[2] Ibn Ḥajr, Tuḥfa al-Muḥtāj bi-shạrḥ al-Minhāj vol.2, pg.419. The English rendition is that of Nyazee's, See Law of business Organization Partnerships, pg.246.
[3] Ijmā 'refers to the consensus of the mujtahidūn (a legist formulating independent decisions in legal matters based on interpretation and application of Qur'ān, sunnah, ij'mā and qiyās) of the followers of Muslim scholars on a matter in any given time.
[4] Refers to the expression, action and tacit approval of Muḥammad, upon him peace and blessings
[5] Al-Shirbīni, Mughni al-Muḥtāj, vol.3, pg.398, Dār al-Kutub al-'Ilmiyyah 2000
[6] ibid

THE ELEMENTS OF MUḌĀRABA

The elements of muḍāraba are six[7]. They are:
1) Investor
2) Capital
3) Form
4) Worker
5) Economic activity
6) Profit

In their treatise of the muḍāraba contract, the point of departure for the classical jurists is the elements of the muḍāraba contract.
I, too, have employed the elements as a point of departure and guideline but my form differs with that of the classical jurists. The form of the work has partially been influenced by Nyazee's work, 'Islamic Law of Business Organization Partnerships'.
For legal rulings, I have relied on Ibn Ḥājr's expository on the 'Minhāj' of Imām al-Nawawī titled 'Tuḥfa al-Muḥtāj bi sharḥ al-Minhāj' as well as Shirbīnī's 'Mughnī al-Muḥtāj ilā Ma'rifa Ma'ānī Alfād al-Minhāj'.

THE INVESTMENT (CAPITAL)

Mūḍāraba is a contract of *gharar*[8], a contract comprising of a greater degree of risk than is normally associated with a commercial contract, in that the proposed economic activity is undefined and the profit is yet to be realized. Had it not been for the need, a contract of this nature would never be enacted. In consideration of the nature of the muḍāraba contract, the capital will be confined to that which is predominantly in circulation and easy to trade with.
For the reasons mentioned above we find the Shāfi'ī jurists stating that in order for the muḍāraba contract to be correct the capital has to either be pure gold or silver coins or both gold and silver coins. It is not permitted to use gold and silver nuggets prior to minting. Jewelry and debased gold and silver coins are also disallowed even if the measure of base metals is known. In this latter case mentioned, the reasoning is that the base metals are *'urūḍ* (merchandise) and the capital may not be merchandise, whether fungible or non-fungible.
The insistence of the classical Shāfi'ī scholars that the investment be either in gold or silver coins is further dictated by the objective of the muḍāraba contract which is to return the investment and share the profits amongst the investor and worker. This objective can only be realized in a just and equitable manner, they argue, if the initial investment is in gold and silver as gold and silver have their own intrinsic value that

[7] Some Scholars list it as five. The difference is in expression, not in substance.
[8] Nyazee states in his work titled 'Fiqhi evaluation on the ordinary share' "Gharar in Islamic law, as far as I understand it, means "something that will most likely give rise to future disputes"
Gharar literally means deception; technically it has been variously defined by the jurists. Ibn Rushd has defined it as follows: *gharar* precludes a thing from being known to exist or determined in terms of its extent or from being able to be handed over. *Gharar* in other words means, ignorance of the existence of something or its extent or inability to hand over the goods.

remains constant. Should the investment comprise of merchandise, merchandise not having any intrinsic value as such and prone to fluctuate depending on external factors of demand and supply etcetera, either the worker or the investor would inevitably be disadvantaged.
Say for example the merchandise was valued at a million rand at the inception of the transaction. The worker makes a profit of five hundred thousand. The value of the merchandise that served as the initial investment i.e. the capital, which he now has to return to the investor has also increased by five hundred thousand rand. His work would then have been in vain as his profit now only serves to cover the investment. Conversely if the value of the merchandise drops the worker would earn a profit without really doing anything. An example of this latter case would be if the merchandise was valued at 1.5 million at the inception of the contract; the worker sells the given merchandise for 1.5 million and does nothing else. At the point of dissolution of the contract, he buys the merchandise for a million rand and realizes a 'profit' of five hundred thousand.

Be it as it may, of relevance to us is into which category does money commodity (rand, dollars, euros) fall into. The classical scholars have categorized *fulūs* (base metal coins) as merchandise and would therefore not permit it to serve as capital. Money commodity is our current *fulūs* and therefore would be treated as merchandise as it does not possess its own intrinsic value and furthermore its value is continuously in flux. My objective of pairing money commodity with merchandise is not to establish that money commodity is not suitable to serve as the capital, but rather to say that if money commodity may serve as an initial investment that merchandise should enjoy the same status.

Can much consideration be given to the fluctuation of the value of the capital be it money commodity or merchandise in a world were things are continuously in flux. Even silver has depreciated in relation to gold. At the time of the Prophet, upon him peace and blessings, there wasn't a marked difference between gold and silver in contra-distinction to what we witness today.
In light of what has been mentioned above, the argument for allowing the initial investment to comprise of merchandise (and thereby money commodity as we know it) makes a lot of sense. The argument runs that the merchandise would be regarded as the capital without any consideration for any appreciation or depreciation in terms of its value like the commodity in a *salam* (forward buying) transaction; in a *salam* transaction, the seller would have to produce the goods at the agreed upon date without any consideration for an increase or decrease of the incremental value of the contracted commodity.
Thus in a muḍāraba contract, if the value consequently increases it will be regarded as a decrease in the wealth of the muḍāraba and if the value decreases it will be regarded as increase in the wealth of the muḍāraba.
If the investor provides capital of 1 million rand, the worker will have to return the said amount without any consideration for any changes in the incremental value of the capital. And Allah knows best.

Furthermore the capital has to be known, stipulated and handed over to the worker. It is not permissible to stipulate that the capital remain in the possession of the investor and that he work with the *muḍārib*.[9]

THE INVESTOR

The requirements of the investor is the same that of the principle in the contract of agency. Thus, he should not be under interdiction due to insolvency, incompetence nor insanity.

An investor may employ the services of two or more workers on condition that they function independently. Thus, it would not be permissible for the investor to stipulate that the workers consult each other. This is the opinion of Imām al-Ḥaramayn and he is supported by Bulqīnī as well as Khaṭīb al-Shibīnī. Bulqīnī states that this view is supported by the scholars of the madhhab (Aṣhāb al-madhhab) and is therefore, decisively, the correct one as one of the conditions of a valid qirāḍ is that the worker function independently.
Imaām al-Rāfi'ī on the other hand has argued that this opinion is not supported by the scholars of the madhhab (school of thought), only to be challenged by Bulqīnī, as stated above, that it actually is.
Yes, one of the peculiarities of a muḍārabah construct is that the economic activity is exclusively reserved for the worker and the investor may not interfere in any way, as this would negatively affect the realization of profits which is the objective of the contract and probably why the investor handed over his money to the worker instead of using it himself. The independence of the worker would however only produce the desired results when the worker is a single person; as for when the worker constitutes two or more persons or a company for that matter, it would make economic sense that the workers be required to consult with each other regarding the administration of the wealth; the workers would then function as partners inter se. And Allah knows best.

Having said this, I consulted, Ibn Ḥajar Haytamī's phenomenal exegesis on the *Minhāj* of Imām al-Nawawī. He has the following to say,
"If he (the investor) stipulates that the multiple workers consult each other, it would not render the transaction null and void, contrary to what Bulqīnī has mentioned at length because they (multiple workers) are as one person; thus stipulating that they consult each other does not run in contra-distinction to the independence of the worker".".

Likewise, it is permissible for two investors to jointly employ the services of a single worker. In this scenario, the profit will be divided amongst the investors in proportion to the capital invested by either, after the worker has received his share.

---

[9] This represents one of the fundamental differences between muḍārabah and mushārakah; whereas it is permissible for a partner to work for the company in a mushārakah agreement, it is not permissible for the investor to participate in any economic activity with the worker.

Repossession of the capital

Repossession of the capital occurs either before the emergence of profit and loss or afterwards. Should the investor repossess a portion of the wealth prior to the emergence of a profit, this amount will be subtracted from the capital and the remaining wealth will be regarded as the capital.
In the advent that the investor repossesses some of the wealth after the emergence of a profit, the repossessed amount will be accounted for from the profit and capital. The percentage of profit in the repossessed amount will be equal to the ratio of profits in relation to the entire amount. Say for example the capital was 100 rands on which a profit of 20 rands was realized and the investor repossessed 20 rands. The profit is thus 1/6 of the entire wealth and therefore the percentage of profit in the repossessed will be 1/6 which translates into three rands and thirty three cents; the remainder will be subtracted from the capital. The workers share in the profit repossessed will not fall away due to a decrease in price etc. and neither will the administration of the investor be executed in it. It will be regarded as a debt upon the investor as stated by Ibn Rif‘a and approved by Al-Isnawi[10].

Form

In an Islamic context it is generally the investor who approaches a potential worker and makes an offer. The offer employed by the investor is either express or otherwise. Examples of express form is when the investor says to the worker, ‘I give you this wealth by way of muḍāraba, or ‘I give you this wealth by way of muqāraḍa’. Non-express forms, i.e. forms that do not contain the words *muḍārabah*, *muqāraḍah* or *mu‘āmalah*, takes place when the investor says to the worker, ‘Take this money and trade with it, or buy and sell on condition that the profits are shared by us. “It may, however, be remembered that the Islamic law favors the objective theory of contracts and the outward meanings are adhered to”.[11]

THE WORKER (MUDĀRIB)

Requirements of the worker

In short, the requirements of a worker in the muḍāraba contract is the same that of an agent. Thus the worker should not be incompetent i.e. the worker should be endowed with some measure of business acumen whereby he may invest sensibly and realize a profit. Furthermore he should not be a minor nor insane. The underlying factor here, as in *wakāla* (contract of agency), is that the worker's administration for himself should be correct. “If he is unable to administer for himself, how will he administer on behalf of someone else” runs the argument of the jurists.[12]

---

[10] Al-Shirbīni, Mughni al-Muḥtāj vol.3, pg.417.
[11] Nyazee, Islamic Law of business Organization Partnerships, pg 248. This is a very important point that requires and independent study of its own.
[12] The plurality of the worker has already been discussed under the discussion “Investor”

The function of the *muḍārib*

The role of the *muḍārib* is to make business, that is, to acquire profit by way of buying and selling as well as fulfilling its supplements[13]. As to exactly what the business supplements are, is governed by the prevalent practice. Examples of business supplements, as stated in the classical texts, are: unfolding and folding clothing in the instance where the worker is trading in clothing. Should the worker engage the services of somebody to carry out 'the business supplements', then he will have to pay for these services with his own money, since this is his responsibility. Any other services engaged, will be remunerated from the wealth of the *muḍārabah*.[14]

The worker is not an employee, employed to do manual labor. Thus, should the investor stipulate that the worker build a house, by way of example, and sell it, the contract will be vitiated; this, because the *muḍārabah* was enacted as a concession owing to the need for it. Here there is no need for the investor to realize this objective by way of *muḍārabah*, since the investor can simply engage the services of somebody to build him a house i.e. by way of *isti'jār* (employment of services)

Should the owner stipulate that the worker engage the services of somebody to perform these tasks, a situation where the worker simply handles the transaction but does not work himself, what then? Ibn Rif'ah has stated in his '*Maṭlab*'[15], "It appears to be permitted"[16]

The aforementioned instances are governed by the stipulation of the investor. Should the worker build a house, by way of example, on his own initiative, the *muḍārabah* contract will not be invalidated but the worker will be liable when operating without the investors permission, for the building materials, in our example, until the house is soled. The profits accrued will be divided as agreed.[17]In this instance the worker will not receive any remuneration for his labor.

[13] Ibn Ḥajr, Tuḥfa al-Muḥtāj bi-shạrḥ al-Minhāj, vol.2, pg.421

[14] Administration and other day to day costs of running of the business will be calculated from the capital or conversely the investor will be billed accordingly. And Allah knows best.

[15] *Al-Maṭlab al-'Ālī ilā sharḥ Wasīt al-Ghazālī* by Aḥmad b. Muḥammad b. Rif'ah amounts to forty volumes. Ibn Rif'ah started from the second quarter of the book until the end. He then progressed from the beginning until the chapter dealing with congregational prayers (*ṣalāt al-jamā'ah*). The balance from *ṣalāt al-jamā'ah* until *bay'* remains unfinished. Ibn Qāḍī Shuhbah has the following to say about it, "It is an amazing work in terms of the copious *nuṣūṣ* (textual transmissions) and *mabāḥith* (plural of the word *mabḥath* which literally means study) found therein. The book to the best of my knowledge is yet to be printed, we do however have a manuscript copy at our disposal, compliments of Moulanā Murād al-Turkī al-Hanafī, on which our shaykh, Maulānā Taha, may Allah keep him with us for a long while yet, is presently working on. May Allah see this invaluable work to its fruition.

[16] Al-Shirbīni, Mughni al-Muḥtāj vol.3, pg.401

[17] Al-Shirbīni, Mughni al-Muḥtāj vol.3, pg.401

Prudence

The worker should administer the wealth of the muḍāraba prudently, not with undue recklessness. Prudence dictates that buying and selling is conducted on a cash basis and that the worker hold on to the merchandise until the money is handed over, should he release the merchandise before taking hold of the money, then he will be liable except if the owner allows him to do so. However, the worker may buy and sell on credit, should the owner consent. When buying and selling on credit, it is compulsory for the worker to employ a witness; failure to do so would render him liable.

The *muḍārib* is allowed to barter since bartering may yield a profit, which is the purpose of the contract. The implication of the aforementioned is that the worker may trade in foreign currency; Subkī has endeavored to break this line of reasoning by drawing a difference between the two. He argues that merchandise is circulatory, in contra-distinction to foreign currency; thus the concession to barter but not deal in a foreign currency. This reasoning leads one to think that should foreign currency be as readily available as merchandise then it, too, would be allowed.

The worker shall not sell to the investor as this would amount to selling the investor's wealth in exchange for his wealth, nor buy in excess of the wealth of the *muḍārabah* (that is the capital and profits) without the permission of the investor. Should the worker buy in excess of the wealth of the *muḍārabah* or execute any of the aforementioned without the permission of the investor, then his action gives rise to one of two scenarios viz. if he made the purchases on credit, then the transaction will be correct but it will not occur on behalf of the *muḍārabah*, but rather for himself. If he made the purchases with the actual capital, then the transaction itself would be null and void.

The worker is barred from traveling with the wealth of the *muḍārabah* without the permission of the owner, even if the journey is short and the road safe, as traveling is the area of presumed danger. Traveling without the consent of the owner does not nullify the contract, but renders the worker liable and labels him a transgressor.

THE QUESTION OF LIABILITY

Risk is an inherent characteristic of business. While Islamic legal principles governing transactions endeavors to minimize the risk for all parties involved, it can by no means obliterate risk completely. Every contract entails a certain amount of risk, some more than others. *Mūḍārabah* is a contract of *gharar*, a very risky contract, in that the proposed economic activity is undefined and the profit is yet to be realized.[18]

Wealth, as an entity cannot produce wealth. In order for wealth to increase, economic activity has to be applied to this wealth. In *muḍārabah* which is a form of partnership, the capital does not increase by itself but rather as a result of the economic effort applied by the worker. Thus any profit accrued should benefit both parties and likewise any loss incurred will in some way adversely affect both parties. The Islāmic legal principles

[18] Al-Shirbīni, Mughni al-Muḥtāj, vol.3, pg.398

featuring in *muḍārabah* aims to plant liability in the right bed as to ensure a just working relationship between investor and worker.

The liability of the worker

The wealth of the *muḍārabah* is a trust. Thus there will be no liability on the worker, should part or all of the wealth be destroyed in his possession on condition that there is no negligence on his behalf. There are however certain instances when the worker transgresses his lawful authority and, as a result becomes liable. The liability status of the worker is, in my opinion and Allah knows best, not affected by the emergence of a profit, given to the fact that he does not become a partner nor by the investor granting him permission to purchase in excess of the wealth of the *muḍārabah*[19]. Thus the worker will continue to enjoy his non-liability status on condition that he does not transgress his lawful authority.

The worker as an *'amīn'* (trustworthy)

The workers word will be accepted regarding any purchases made on credit, whether he acquired it for himself or for the *muḍārabah*, since he best knows his intention[20]. Should the worker make any cash purchases with the wealth of the *muḍārabah*, then these purchases will belong to the *muḍārabah* without regard for any counter-claim that there may be[21]. This is the preponderant view of the Shāfi'ī madhhab.

It appears that the ideal *muḍārabah* envisaged by the Shāfi'ī jurist is where the muḍārib uses the wealth of the *muḍārabah* exclusively and does not mix it up with any other wealth. What then happens, should the wealth of the *muḍārabah* stand mixed up with the workers personal wealth? Says Imām al-Ḥaramayn, "Should he (the worker) mix the wealth of the muḍāraba with his personal wealth, he will be liable, but not dismissed"[22]. In this scenario, where the capital stands mixed up with the muḍārib's personal business capital, the muḍārib's word as an amīn will have to be accepted.[23]

---

[19] My deductions here are based on my understanding of the contract in light of the Shafi'ī school of thought.
[20] Ibn Ḥajr, Tuḥfa al-Muḥtāj bi-shạrḥ al-Minhāj, vol. 2, pg.428
[21] Ibid
[22] Ibid, vol.2, pg.425
[23] What happens today when a person invests his money by way of *muḍārabah* with a financial institution? Is his money kept separately and invested? In a micro form of muḍārabah it is relatively easy to keep the actual investment separate. However in the macro economy that we find ourselves in, it is very difficult or rather nigh impossible to keep the initial investment separate. In certain instances, the initial capital is not even particularly specified in terms of its corporeal; an example would be when a person makes an investment of a hundred thousand rand by cheque. This amount is therefore from the outset not particularly specified. Furthermore, most transactions are concluded electronically and as such is not particularly specified. One would then respectfully submit that, in light of macro economics and prevalent forms of payment, that the investment need not be particularly specified in terms of its corporeal and neither does it have to be kept separate in a multiple *muḍārabah*. The worker is however barred from using the money (the amount) for his personal benefit.

THE COMMODITY

Stipulation of a particular commodity in the muḍāraba contract is not required, as apposed to wakāla (contraction of procuracy). The promise of a share in the profits is incentive enough to propel the worker to economic activity and prudence in this regard.

As a rule, any stipulation vis-à-vis commodity that encroaches on the realization of profits or overly restricts the activity of the muḍārib, will not be permitted. Thus, in light of the legal principle expounded above, it would not be permissible for the investor to stipulate that the worker purchase a specific item, or deal with a particular person[24]. Similarly, it would not be permissible for the investor to stipulate that the worker deal in a scarce commodity.
While the investor may not stipulate the aforementioned, he may, however, bar the worker from them, since barring them does not infringe on the objectives of the contract in any way.

PROFIT

The goal of the muḍāraba contract is the acquisition of profits. The profit accrued is the privilege of the investor and worker exclusively. Neither the worker nor investor may stipulate a share of the profits for a third person. The profit is to be shared amongst them as per agreement. It is not permissible for the investor to stipulate all the profits for himself or for the worker. Thus the contract would be vitiated should the investor say to the worker, 'I give you this by way of muḍāraba on condition that all profits accrued are yours' or 'I give you this by way of muḍāraba on condition that all profits accrued are mine'. In the former case the worker will receive the standard remuneration for his services since he worked expecting something in return; not so in the latter case.
The percentage of profit must also be stipulated. Should the investor say to the worker,'I give you this wealth by way of muḍāraba on condition that you receive a share of the profits', the muḍāraba will be vitiated. The investor may not stipulate a specified amount of the profits for himself or the worker. Thus, should he say, 'I give you this wealth by way of muḍāraba on condition that I receive one thousand rands in addition to half of the profits', the transaction will be invalidated. In brief, the profit allocated to either the investor or worker cannot be a lump sum or a fixed percentage of the capital.[25]

The emergence of profits

Nyazee[26] presenting the Ḥanafi *madhhab* by quoting Ibn 'Ābidīn, states, "The muḍārib becomes a partner of the *rabb al-māl* (investor) when profit emerges, because the muḍārib is a partner in profit, and an agent is not entitled to the profit on the basis of his

---

[24] Should the investor stipulate a group of people with whom the muḍārib is to deal with, and it is possible to realize a profit in dealing with them, then the contract would remain intact.
[25] It is therefore not permissible construct a ceiling for the amount that either the investor or worker may receive. An example would be when the muḍarabah contract states that the investor will receive five percent of all profits as long as it does not exceed a given fixed percentage of the capital.
[26] Nyazee, Islamic Law of business Organization Partnerships, pg. 253

work after the emergence of profit, but he becomes a partner here due to the contract, that is, the contract of partnership. The wealth of the muḍāraba, then, becomes a joint ownership between the muḍārib and the rabb al-māl, and the share of the muḍārib is now on the basis of his undivided share in the co-ownership". This is a devastating provision and renders the contract of the muḍāraba quite temporary. It is valid or it exists during the period when profits have not emerged. What happens when there is a loss after the emergence of the profits? Does it revert back to a muḍāraba? A clear answer is not provided by the Jurist. End quote.
According to the Hanafi madhhab the worker owns his share with the emergence of the profits and thus becomes a partner of the investor. The position assumed here has given rise to the unanswered questions of Nyazee.
According to the Shāfi'ī school of thought, the worker owns his share of the profits on division of the wealth. They argue that should he own his share on the emergence of the profits, he would become a partner and any losses encountered after this would be accounted from both the worker and investor. The corollary is incorrect since the profit, as a principle, is a protectionist of the capital as we shall see in the following discussion.

How loss affects the profit

Losses occurring due to drop in price or defects will be subtracted from the profit and consolidated thereby as far as possible. Likewise any loss occurring due to a natural disaster e.g. flooding, fire or as a result of theft or usurpation after the administration of the worker with the money by either buying or selling, will be subtracted from the profit according the preponderant view in the Shāfi'ī madhhab. The opposite view holds that such losses will not be subtracted from the profit, since the administration of the worker has no bearing on this form of loss.
Losses incurred prior to the administration of the worker will be subtracted from the capital according the preponderant view of the madhhab.

'THE TEMPORORY NATURE OF THE MUḌĀRABA CONTRACT'

Period of the contract

Before we discuss the 'temporary nature of the muḍāraba contract', it appears appropriate to deliberate over the period of the contract.
The muḍāraba contract is not governed by a definite time period. The indefinite time period of the contract is given to the objective of the contract, profits, which do not have a fixed time. A profit may be realized within a day or after the passing of an entire year. It is for this very reason that fixation of a time period vitiates the muḍāraba contract. Should the investor mention a time, not by way of fixing it, for example he says to the worker, "I give you this wealth by way of muḍāraba and do not trade after the passing of a month" this too will render the contract null and void. Alternatively, should the investor say to the worker, "I give you this wealth by way of muḍāraba, but do not conduct any purchases after the passing of a month, you may however continue selling" then the contract will still be intact as this provision does not encroach on the objective of the contract.

The Ḥanafī and Ḥanbalī schools of thought are of the opinion that a maximum time limit may be fixed for the *muḍārabah* contract. No clear answer, says Mufti Taqi Uthmani, is found in the classical works regarding the issue of a minimal time limit. In light of the general principles of the Sharī'ah, he feels that there is no problem in stipulating a minimum time period for the contract especially when taking into consideration the current economic setup.

'The temporary nature of the muḍāraba contract'

The temporary nature of the muḍāraba contract, amongst other things, makes it difficult to implement in modern times, or at least its utility will be quite limited, argues Nyazee. According to Nyazee, on the appearance of profits the muḍāraba stands converted to a sharika[27]. This is based on the Ḥanafi position that the worker owns his share on the emergence of profits.

According to the Shāfi'ī madhhab, as stated previously, the worker owns his share by division of the wealth of the muḍāraba. Thus, prior to the division, the entire wealth is regarded as the wealth of the muḍāraba and may be re-invested by way of muḍāraba. The classical jurists state that the worker is not allowed to invest in excess of the capital and profits without the permission of the investor[28]. This, in my opinion, implicitly implies that the wealth of the muḍāraba may be re-invested after the realization of an initial profit, by way of muḍāraba.

I feel that there is no need to construct other contracts that are linked to the muḍāraba in a manner that the secondary contracts over-ride the initial muḍāraba contract since the muḍāraba contract is developed enough to contain these secondary provisions without undergoing a complete metamorphosis. And Allah knows best.

THE VITIATED MUDARABA

Should the muḍāraba stand vitiated, the administration of the worker will be executed on account of the authorization issued by the investor. In such instances, where the muḍāraba is vitiated, the investor will receive the entire profit and the worker will be given the standard remuneration for services provided. The worker will be eligible for remuneration even though no profit was realized.

TERMINATION OF THE CONTRACT

Both investor and worker reserve the right to terminate the contract, whenever they wish, with or without the blessing of the other party[29]. Likewise, the contract will be annulled should the investor or worker die, become insane or lose consciousness.

At this juncture, the worker has to collect all debt owing to the muḍāraba in addition to converting the capital into fluid if the capital consists of goods at the time.

---

[27] Nyazee, Islamic Law of business Organization Partnerships, pg. 253

[28] Ibn Ḥajr, Tuḥfa al-Muḥtāj bi-shạrḥ al-Minhāj, vol. 2, pg 424

[29] The Ḥanafī and Ḥanbalī schools of thought are of the opinion that a maximum time limit may be fixed for the *muḍārabah* contract. No clear answer, says Mufti Taqi Uthmani, is found in the classical works regarding the issue of a minimal time limit. In light of the general principles of the Sharī'ah, he feels that there is no problem in stipulating a minimum time period for the contract especially when taking into consideration the current economic setup.

CONCLUSION

In order to ensue the equal distribution of wealth in the community, Islamic law has taken certain measures, some binding others not. The former i.e. binding measures embodies itself in zakāt, inheritance, while the latter is represented by verses of the Holy Qur'ān and traditions of the Prophet, upon him peace and blessings, encouraging us to spend in the path of Allah.
Muḍāraba is a contract wherein capital is provided in lure of a variable return; this in my opinion and Allah knows best is one such provision instituted by Islamic law to ensue the equal distribution of wealth as both the worker and investor stand to lose if the venture fails in contra-distinction to interest based contracts where the investor receives a fixed return irrespective whether a profit is realized or not. In this scenario the investor, already rich becomes richer as a result of these interest based contracts which inevitably leads to the unequal distribution of wealth within the community, accompanied by its vices.

It is my hope that this work will aid Muslims in reviving the economic sphere of their lives and be instrumental in removing the pseudo-secular view held by certain Muslims vis-à-vis Islam.

Last but no least, a sincere thanks to my peers, engaging with whom I found the words of Imām al-Nawawi, "Sitting with the '*ulemā*' for a little while is better than hours of perusal by oneself' to be true.

Muḥammad Carr